FILE COPY

Supreme Court, U.S.
FILED
JUL 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-85

PAUL M. BRANZBURG - - - - - Petitioner

versus

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - Respondent

AND

PAUL M. BRANZBURG - - - - - Petitioner

versus

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,
Counsel for Petitioner

July 15, 1971

WESTERN LITHO-KENTUCKY CO., INC., 500 W. CHESTNUT, LOUISVILLE, KY.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

No. 70-85

AUL M. BRANZBURG. . . . . .Petition

versus

OHN P. HAYES, et al . . . . . Responden

ON WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF KENTUCKY

ERRATUM

The following citations at pages iii and 13 were in
vertently incomplete and should read:

Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 193
rev'd, 299 U.S. 269 (1936)

Providence Journal Co. v. McCoy, 94 F. Supp. 186
(D.R.I. 1950), aff'd, 190 F. 2d 760 (1st Cir. 195
cert. denied, 342 U.S. 894 (1951)

All references to the foregoing decisions should be
leted from the brief at pages iii and 13.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions	2–3
Statement of Questions Presented for Review	3
Statement of the Case	3–8
Summary of Argument	9–10
Argument	10–45
I. Freedom of the press guaranteed by the First Amendment is the cornerstone of our constitutional edifice and has been so recognized by this court. State action inhibiting the exercise of First Amendment freedoms is generally proscribed	10–27
A. Freedom of the press protects all activities necessary for the press to fulfill its First Amendment functions	12–14
B. The state action in the instant case destroys the effective exercise of First Amendment rights	14–27
1. State action which discourages the flow of information between confidential informants and newsgatherers violates the First Amendment to the Constitution of the United States	18–22
2. State action which results in self-censorship by a reporter violates the First Amendment	23–25

PAGE

3. State action which deprives an individual of the right to speak anonymously through the news media violates the First Amendment 26–27

II. There are numerous examples in the law where compelled testimony is denied in order to protect and preserve other more important rights and interests 28–33

III. This Court should declare that the First Amendment confers upon newsmen the privilege not to be compelled to enter a closed proceeding and not to be compelled to disclose confidential information absent a demonstration in a prior open hearing of a compelling and overriding need for such 34–42

IV. The State has made no demonstration of any need for the information allegedly possessed by the Petitioner 42–45

Conclusion 46

CITATIONS

Cases:

PAGE

Ashton v. *Kentucky*, 384 U. S. 195 (1966) 11, 34
Associated Press v. *United States*, 326 U. S. 1 (1945) 11
Associated Press v. *KVOS*, 80 F. 2d 575 (9th Cir. 1935) 13
Bates v. *Little Rock*, 361 U. S. 516 (1960) 26
Bridges v. *California*, 314 U. S. 252 (1941) ... 14, 35, 38, 40
Caldwell v. *United States*, 424 F. 2d 1081 (1970) ... 6, 8, 21
DeGregory v. *Attorney General*, 383 U. S. 825 (1966) 34, 40
DeJonge v. *Oregon*, 299 U. S. 353 (1937) 11
Escobedo v. *Illinois*, 378 U. S. 478 (1964) 37
Gibson v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963) 21–22, 34, 35
Griswold v. *Connecticut*, 381 U. S. 479 (1965) 13
Grosjean v. *American Press Co.*, 297 U. S. 233 (1936) 12, 25
In re Jackson, 96 U. S. 727 (1878) 13
Lamont v. *Postmaster General*, 381 U. S. 301 (1965) . 13, 17
Malloy v. *Hogan*, 378 U. S. 1 (1964) 36
Mapp v. *Ohio*, 367 U. S. 643 (1961) 36
McCray v. *Illinois*, 386 U. S. 300 (1967) 15–16, 31
Miller v. *United States*, 357 U. S. 301 (1958) 36
Miranda v. *Arizona*, 384 U. S. 436 (1966) 31, 36, 37
Murdock v. *Pensylvania*, 319 U. S. 105 (1942) 10
National Association for the Advancement of Colored People v. *Alabama*, 357 U. S. 449 (1958) ... 10, 26
Near v. *Minnesota*, 283 U. S. 697 (1931) 25
New York Times Co. v. *Sullivan*, 376 U. S. 254 (1964) 11–12
New York Times Co. v. *United States*, 39 U.S. L.W. 4879 (June 30, 1971) 25
Providence Journal Co. v. *McCoy*, 94 F. Supp. 186 (R.I. 1950) 13
Schneider v. *State*, 308 U. S. 147 (1939) 11, 35, 36

Cases: (Cont'd)

PAGE

Shelton v. *Tucker,* 364 U. S. 479 (1960) 21, 35
Sherbert v. *Verner,* 374 U. S. 398 (1963) 34, 40, 41
Smith v. *California,* 361 U. S. 147 (1959) 23–24
Talley v. *California,* 362 U. S. 60 (1960) 12, 26
Terminello v. *Chicago,* 337 U. S. 1 (1949) 11
Watkins v. *United States,* 354 U. S. 178 (1957) 16, 34

Constitutional Provisions:

First Amendment to the Constitution of the United States. 6, 10, 11, 12, 13–14, 17, 35–36, 38, 42, 44, 45, 46
Fourteenth Amendment to the Constitution of the United States. 6

Miscellaneous:

Barron, *Access To The Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967) 27
Desmond, 13 ALBANY LAW REVIEW, No. 2, 1 (1949) .. 20
Guest and Stanzler, *The Constitutional Argument for Newsmen Concerning Their Sources,* 64 N.W. U.L. REV. 18 (1969). 16, 18
Kentucky Revised Statutes, § 421.100. 6
Note, *Privacy and Efficient Government: Proposals for a National Data Center,* 82 HARV. L. REV. 400 (1968). 33
State of New York, LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDIES (1949) 19
8 J. WIGMORE, EVIDENCE (McNaughton rev. ed. 1961) 28, 29, 30, 31, 32
6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906) .. 13

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1381

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - - *Respondent*

AND

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals re Respondent Hayes (*Branzburg* v. *Pound*) (App. 22) has been officially reported at 461 S. W. 2d 345; the opinion of the Kentucky Court of Appeals re Respondent Meigs (App. 55) has not yet been officially reported.

JURISDICTION

The date of entry of the judgments sought to be reviewed is January 22, 1971. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional provision here involved is the First Amendment to the Constitution of the United States, which is set out verbatim as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is made applicable to the state action here involved by reason of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to disclose confidential information received by him in the course of his newsgathering activities? (*Branzburg* v. *Hayes*)

II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to enter the grand jury room to respond to inquiry into confidential information received by him in the course of his newsgathering activities? (*Branzburg* v. *Meigs*)

STATEMENT OF THE CASE

This brief is filed on behalf of Paul M. Branzburg, against the Respondents, John P. Hayes, and Henry Meigs, who are judges in state trial courts of general jurisdiction, the circuit courts in Jefferson County and Franklin County, Kentucky. In two separate actions the Respondents overruled the Petitioner's refusals to answer questions asked of him by a grand jury and to appear before a grand jury. His refusals were based on his rights under the First Amendment to the Constitution of the United States. Both courts announced that contempt proceedings would follow continued refusal and set dates for such proceedings. In each case

the Kentucky Court of Appeals affirmed the rulings of the Respondents, and thereby authorized the Respondents to punish Petitioner for contempt of court in the event Petitioner failed to answer certain questions posed by the grand jury in one case, and failed to appear before the grand jury in the other case.

Petitioner was an investigative reporter employed by The Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky. In his capacity as a reporter for said newspaper the Petitioner made particular efforts to become acquainted with the "hippie community" in Jefferson County and other parts of Kentucky. The Petitioner devoted several newspaper stories and articles to the problem of drug abuse within Jefferson County and other parts of Kentucky. The two newspaper articles which are the subject of the controversy here involved were the result of Petitioner's efforts in this area.

The Respondents are circuit judges in Jefferson County and Franklin County, Kentucky. Under applicable Kentucky law, the circuit judge is the appropriate judicial officer to hold an individual in contempt if the individual improperly refuses to appear before or answer questions posed by a grand jury in the county where the circuit judge is sitting.

The first of these two consolidated cases was brought in the Jefferson County Circuit Court, Criminal Branch, Second Division, before the Honorable J. Miles Pound, the predecessor of the Respondent, John P. Hayes.

The Petitioner wrote an article which appeared in the November 15, 1969, edition of The Courier-Journal (App. 3). This article described with considerable detail the efforts of two young Louisville, Kentucky, residents to produce enough hashish from marijuana to net them an income of $5,000.00 for three weeks of work. The article included a photograph of a pair of hands working above a laboratory table containing what was identified as hashish. The article stated that the individuals involved had received a promise that their names would be held in confidence.

As a result of this article, the Petitioner was subpoenaed before the Jefferson County Grand Jury and was asked to identify persons mentioned in the newspaper article. The Petitioner refused to answer these questions, and pursuant to the applicable rules the Petitioner was brought before the Circuit Judge, where the foreman of the grand jury read to the Judge the following questions which the Petitioner had refused to answer:

> 1. On November 12, or 13, 1969, who was the person or persons you observed in the possession of marijuana about which you wrote an article in The Courier-Journal on November 15, 1969?
>
> 2. On November 12, or 13, 1969, who was the person or persons you observed compounding marijuana, producing the same to a compound known as hashish?

After hearing argument of counsel based upon First Amendment freedom of the press guarantees,

the Court ordered that the Petitioner answer these questions (App. 6).

Counsel for Petitioner immediately filed a petition for temporary and permanent relief in the Kentucky Court of Appeals (App. 8). On November 25, 1969, the Kentucky Court of Appeals granted a Temporary Order of Prohibition pending review of the case on its merits (App. 12). The Petitioner requested relief pursuant to the First and Fourteenth Amendments to the Constitution of the United States, as well as a Kentucky statute, KRS 421.100 (App. 9), which granted newspaper personnel immunity from disclosing a "source of information."

On November 27, 1970, the Kentucky Court of Appeals determined that the phrase "source of information" in the Kentucky statute did not protect information obtained by the reporter's personal observation, and thus decided that the Petitioner had no immunity under the statute in this particular case. The Court of Appeals also rejected the Petitioner's First Amendment arguments (App. 13).

Pursuant to the rules of the Kentucky Court of Appeals, Petitioner filed a Motion to Reconsider, citing the November 16, 1970, decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell v. United States*, 434 F. 2d 1081 (1970). The Petitioner urged the Court to reconsider Petitioner's First Amendment arguments (App. 21).

In the case involving the Respondent Meigs, the Petitioner wrote an article concerning the use of marijuana and other drugs in Franklin County, Kentucky,

which appeared in The Courier-Journal & Louisville Times on January 10, 1971 (App. 30).

Petitioner was subpoenaed to appear before the Franklin County Grand Jury on the 18th day of January, 1971, to testify in the matter of "violation of statutes concerning the use and sale of drugs" (App. 42).

Petitioner appeared before Judge Meigs on January 18, 1971, and moved the Respondent to quash the grand jury subpoena and excuse the Petitioner from testifying before the Franklin County Grand Jury. The motion was based on Petitioner's First Amendment rights under the Constitution of the United States (App. 43).

Judge Meigs denied the Petitioner's motion, but issued a protective order in regard to the testimony of the Petitioner before the grand jury (App. 46).

Petitioner immediately petitioned the Court of Appeals of Kentucky for a writ prohibiting Judge Meigs from requiring Petitioner's appearance before the grand jury and ordering Judge Meigs to quash the subpoena issued by the grand jury (App. 47).

On January 22, 1971, the Court of Appeals modified its opinion in *Branzburg* v. *Pound,* (App. 22), thus denying Petitioner's Motion to Reconsider, and also denied Petitioner's request for writs of prohibition and mandamus in the *Meigs* case (App. 54). The Court of Appeals followed the *Meigs* order with an opinion in which it refused to recognize Petitioner's First Amendment rights in the particular situation involved and specifically rejected the holding of the Court of

Appeals for the Ninth Circuit in *Caldwell, supra* (App. 55).

Petitioner then moved for an order staying the effective date of the order of the Court of Appeals in both the *Pound* and *Meigs* cases until Petitioner could obtain a Writ of Certiorari from the Supreme Court (App. 29 and 63). In addition, Petitioner moved for a temporary writ of prohibition against Respondent Meigs pending action upon application to the Supreme Court for a Writ of Certiorari (App. 62). The Court of Appeals denied the requested stays and writ (App. 29 and 63).

On January 26, 1971, Mr. Justice Stewart temporarily restrained Respondents from compelling Petitioner to appear before the grand juries in Jefferson County or Franklin County, Kentucky, pending action by the Supreme Court upon a Petition for Certiorari. On February 23, 1971, the Petitioner filed a joint Petition for a Writ of Certiorari to the Kentucky Court of Appeals, pursuant to Rule 23 of the Supreme Court, seeking a review by this Court of both cases. On May 3, 1971, certiorari was granted in both cases.

The Petitioner seeks a determination from this Court that there is a First Amendment privilege permitting a newsman to refuse to appear before a grand jury and to refuse to testify before a grand jury concerning knowledge acquired by the newsman under confidential circumstances in the course of his occupation.

SUMMARY OF ARGUMENT

A. Newsgathering activities are essential to the effective functioning of a free press, and as such are protected by the First Amendment to the Constitution of the United States. A significant portion of such newsgathering activities is the development by individual reporters of confidential informants who give information to the reporter with the understanding that some or all of the information or the source of such information will not be revealed.

B. The courts below are attempting to force the Petitioner to appear before a grand jury to answer questions pertaining to the identities of such informants and unpublished information received from them. Such compelled testimony will inevitably discourge these and other informants from contacting and talking to reporters, as well as discourage the reporter from publishing information gathered from such sources. This inability of the press to be able to obtain such information, or its reluctance to use such information, is a severe abridgment of the freedom of the press protected by the First Amendment.

C. In the light of the foregoing, the First Amendment provides newsmen a privilege against compulsory appearances in closed proceedings and against compulsory disclosure of confidential information. In order to overcome this privilege the state has the heavy burden of proving, by clear and convincing evidence, that the testimony of the reporter is absolutely necessary to prevent direct, immediate and irreparable prospective damage to the national security, human

life or liberty. Any lesser burden does not adequately protect the press from state action which endangers the freedom of the press guaranteed by the First Amendment.

D. In the instant cases the Kentucky Court of Appeals failed to recognize the proper application of the First Amendment to such a situation, and improperly ruled that the Petitioner must appear and testify before the grand juries in closed hearings.

ARGUMENT

I. FREEDOM OF THE PRESS GUARANTEED BY THE FIRST AMENDMENT IS THE CORNERSTONE OF OUR CONSTITUTIONAL EDIFICE AND HAS BEEN SO RECOGNIZED BY THIS COURT. STATE ACTION INHIBITING THE EXERCISE OF FIRST AMENDMENT FREEDOMS IS GENERALLY PROSCRIBED.

This Court has long recognized that the rights protected by the First Amendment are crucial to our political structure, and it has not hesitated to protect these rights against governmental restriction. Freedom of the press occupies a "preferred position." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1942).

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, 461 (1958).

The First Amendment reflects "the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." *Schneider* v. *State,* 308 U. S. 147, 161 (1939). "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); *Ashton* v. *Kentucky,* 384 U. S. 195 (1966). "[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello, supra,* at 4. It is a primary purpose of the First Amendment to secure "the widest possible dissemination of information from diverse and antagonistic sources. . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945); *see, e.g., De Jonge* v. *Oregon,* 299 U. S. 353 (1937).

Achievement of First Amendment purposes is fundamental to the continuity of our political institutions and the preservation of our cultural and social heritage. Thus, this Court has repeatedly emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964).

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. . . . [S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by free press cannot be regarded

> otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

This brief demonstrates that the practices complained of herein are inherently destructive of First Amendment objectives. Compulsory disclosure by a newsman of his confidential sources of information necessarily inhibits future confidences. Compulsory appearance of a newsman before a grand jury or other secret tribunal necessarily conjures up doubts, fears, and distrust restrictive to future confidences.

A. FREEDOM OF THE PRESS PROTECTS ALL ACTIVITIES NECESSARY FOR THE PRESS TO FULFILL ITS FIRST AMENDMENT FUNCTIONS.

The protection afforded the freedom of the press by the First Amendment has long been acknowledged to include more than simply the freedom to publish.

> "The evils to be prevented (by the First Amendment) were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essention to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean, supra,* at 249-50 (*quoting* 2 Cooley, Constitutional Limitations, 8th ed., p. 886). *See also, Talley* v. *California,* 362 U. S. 60 (1960).

Clearly, limitation of freedom of the press to publication *per se* would render the right ineffectual.

Thus, "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *In re Jackson,* 96 U. S. 727, 733 (1878).

Similarly, the newsgathering process is as essential to the ability of the press to fulfill its function as the freedom to publish or the freedom to circulate the final product. *Associated Press* v. *KVOS,* 80 F. 2d 575 (9th Cir. 1935); *cf. Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Providence Journal Co.* v. *McCoy,* 94 F. Supp. 186 (R. I. 1950). "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 6 WRITINGS OF JAMES MADISON 398 (Hunt. ed. 1906). If the right to gather news is limited, then the right to a free press is correspondingly limited. If the freedom to obtain the information to be published is destroyed, then it is clear that the freedom of the press has likewise been destroyed. Therefore, the right of a news gatherer to seek and obtain the facts and information unrestrained by fear of state harassment is crucial to publication, and the right of the public to receive the facts and information must be guarded by this Court. *Griswold* v. *Connecticut, supra; Lamont* v. *Postmaster General,* 381 U. S. 301 (1965).

The structure of First Amendment freedoms thus clearly includes newsgathering. Newsgathering, therefore, is equally exempt from governmental inhibition,

> [f]or the First Amendment does not speak equivocally. It prohibits any law "abridging the free-

dom of speech or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of the liberty-loving society, will allow. *Bridges* v. *California*, 314 U. S. 252, 263 (1941).

B. THE STATE ACTION IN THE INSTANT CASES DESTROYS THE EFFECTIVE EXERCISE OF FIRST AMENDMENT RIGHTS

The chilling effects of compelling a newsgatherer to appear and to testify before a grand jury or any other forum regarding his confidential informants and confidential information received by him in his capacity as a newsgatherer are clear: The state will have imposed severe limitations on the freedom of press, on the public's right to receive news and information, and on individual rights to speak out on issues of public concern and importance.

In the instant cases the State is claiming the right to subpoena newsmen to appear before a closed session of a grand jury without the burden of showing a compelling and overriding need for the newsman's testimony. The State seeks names of confidential informants without any such demonstration of compelling and overriding need. The decision of the Kentucky Court of Appeals found that the newsman's role in society is no different from that of any other citizen and that no First Amendment rights were involved (App. 57-60). Petitioner submits that such a finding violates the First Amendment and is inconsistent with the holdings of this Court in a multitude of cases.

At best, what the State is seeking to do in each of these cases is enlist the Petitioner and his investigative skills as an arm of the State in its police function. The Petitioner over a period of many months worked to develop a rapport with and earn the trust and confidence of the drug users. This trust and confidence enabled the Petitioner to gain the information passed on to the general public through the news stories here involved. If the state can require the Petitioner to disclose his confidential information to the grand jury after each news story is published, his credibility in keeping confidences will soon be destroyed. Without such confidences news articles such as those involved here would not be published.

For the possibility of one criminal indictment, the State is seeking to take action which will result in a severe limitation of the continuing ability of all newsgatherers to perform their jobs, which jobs are vital to the effective functioning of a free press. By compelling the appearance and testimony of one reporter, the Petitioner, the State will have crippled the capacity of the entire press to report on news and events of interest and importance to the public. Such a continuing limitation on the functioning of the free press cannot be justified by the possibility of one criminal indictment.

The state with its vast resources is well able to employ agents capable of investigating the same activities here investigated by the Petitioner. These state agents also may promise that informants' names will be kept confidential. *See, e.g., McCray* v. *Illinois,* 386

U. S. 300 (1967). A free press cannot long survive when cast in the role of a substitute for the police.[1]

This Court has recognized that the mere appearance before a closed body such as a grand jury may do harm to a person's associations. "The Bill of Rights is applicable to investigations as to all forms of governmental action." *Watkins* v. *United States*, 354 U. S. 178, 188 (1957):

> Abuses of investigative process may imperceptively lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. *Watkins* v. *United States*, *supra*, at 197.

By requiring a newsman to appear before a grand jury or to disclose the names of confidential informants or the nature of confidentially received informa-

[1]There have also been instances where governmental officials have used the subpoena power to harrass informants in order to prevent embarrassing disclosures, rather than achieve any legitimate governmental purpose. Such an instance involved Eugene Patterson, Editor of the Atlanta Constitution, as reported in Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969). Patterson received confidential information from a physician concerning the use of narcotics inside the Georgia State Prison. A grand jury was called, Patterson appeared and produced extensive evidence of drug sales and use inside the prison, but the district attorney showed no interest in this information about illegal activity. Apparently the district attorney's only interest was in identifying the source of Patterson's information. Although Patterson refused to reveal the sources when threatened with contempt, the physician finally came forward and identified himself. Upon learning the physician's name, the grand jury immediately adjourned without investigating the prison and without even calling the physician to testify.

tion the state deprives that reporter of one of his fundamental methods of obtaining information. By interfering with the newsgathering process the state has made severe inroads on the fundamental freedoms guaranteed to the press under the First Amendment.

In like manner, calling a reporter before a grand jury to question him about confidential information received in his capacity as a newsman is a measure of governmental interference. Such interference cannot be tolerated unless compelling and overriding government interference with the operation of the press cannot be tolerated.

> [T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful.
>
> * * *
>
> [I]nhibition as well as prohibition against exercise of precious First Amendment rights is a power denied to government. *Lamont* v. *Postmaster General,* 381 U. S. 301, 308-309 (1965), (Brennan, J., concurring).

The means by which the state can restrict and impede the exercise of First Amendment freedoms are varied, but among the most efficient is to harrass newsmen by issuance of subpoenas for their testimony. Inhibition, by any means, of the exercise of these essential freedoms cannot be tolerated.

1. STATE ACTION WHICH DISCOURAGES THE FLOW OF INFORMATION BETWEEN CONFIDENTIAL INFORMANTS AND NEWSGATHERERS VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In many cases confidential sources of information are available to newsmen only because the newsman has promised, either expressly or by implication, to protect the identity of his source. It would seem to be evident from a reading of any modern newspaper that many items of news are received from confidential informants.[2] Such phrases as "highly placed government officials" or "a reliable source" are very much a part of the newspaper vocabulary. In the present cases, the article which brought on the grand jury investigation in Jefferson County specifically indicated that the information had been given only after a promise of confidentiality (App. 3), and the consistent omission of names in the other text leaves no doubt that an understanding existed regarding the disclosure of those names. The affidavit submitted by the Petitioner to the Kentucky Court of Appeals in the *Meigs* case (App. 51) illustrates graphically the difficulties involved in obtaining the information necessary to do a

[2]A significant amount of the news published today is, directly or indirectly, a result of confidential relationships and sources developed by newsmen. Recently a poll was conducted among newspaper editors, including The Courier-Journal, concerning the value of confidentially received information. Responses were received from thirty-seven of the most respected newspapers in the country, with nearly unanimous results indicating that confidentially received information was an essential element of many of the news stories appearing in these publications. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969). It would be hard to imagine the *Wall Street Journal*, *Christian Monitor*, and many others without thirty, forty or even fifty per cent of their news articles.

story on illegal use of drugs. Many of these contacts required much persuasion and assurances of confidentiality before revealing any information to the Petitioner.

That compulsory grand jury appearances or compulsory disclosure of confidential informants will be detrimental to the function of the press is recognized by many authorities outside the fourth estate. Thus, as noted in STATE OF NEW YORK, LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDIES (1949), at pages 131 and 132, the District Attorney of Richmond County, New York, stated:

> If the press and radio are to continue to be an important factor in democracy, they must be as free to gather as to distribute news. . . . If the newspaper man can be compelled to reveal these sources of information from which they obtain facts, then these sources can be shut off. When they are shut off, news becomes subject to censorship and control. When that happens it ceases to be factual, and then it ceases to be news. Any distortion of the news, as it is gathered, taints it right down to the individual reader or listener. When news can be distorted, suppressed, censored or controlled by anyone, it becomes propoganda. Real news is truth. Part of the news is not the truth.

One of the sponsors of the newsman's privilege bill which was introduced in the New York Legislature in the late 1940's, Thomas Desmond, commented on the importance of such a bill:

The newsman is truly a guardian of the public interest. He is the conscience of our legislators, the public's independent auditor, the ferret of dereliction of public duty. Nearly two decades in public life have convinced the author that without the ever present news reporter of a free press our government affairs would be in a disreputable state. Democracy without a free press is no guarantee of freedom.

Anyone familiar with the history of our free press knows that newsmen have fought corrupt judges, bungling politicians, black marketeers, and the stealthy saboteurs of democrary through the antiseptic power of exposure.

Furthermore, the operation of our free press, if we want it to be more than a mere compendium of official propaganda and releases, is dependent upon protecting informants. If they are not protected, the sources of stories will dry up. The fears of our district attorneys that such law might interfere with their tracking down of criminals is groundless, for surely the law enforcement officials, aided by staffs of trained technicians and armed with the latest weapons of science are in a better position to find a criminal than is a reporter whose only equipment is a "nose for the news." Thomas C. Desmond, 13 *Albany L. Rev.*, No. 2, 1, 8 (1949).[3]

The possibility of public disclosure of their identities would often be sufficient to discourage such informants, whose jobs or reputations may well depend on those who are displeased by the information pub-

[3]The instant cases, however, convincingly demonstrate that protection of the fundamental First Amendment rights in issue here cannot be left to the vagaries of state legislation or state court interpretation.

lished. *Cf. Shelton* v. *Tucker,* 364 U. S. 479 (1960). As these sources become less and less willing to give newsmen information to which they alone have access, the result is that news reporting becomes more and more restricted to facts and information already generally available to the public. State action that leads to such a result is state action which is restricting and limiting the freedom of the press.[4]

In *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539 (1963), the Court addressed itself to a similar problem caused by disclosure in the closely related First Amendment area of freedom of association, and found that a requirement of disclosure of membership lists was unconstitutional.

> While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged pri-

[4]Because of the nature of the proceedings in this case, the Petitioner was not given the opportunity to present evidence from other sources concerning potential harm to his effectiveness as a reporter if he can be required to appear before a grand jury. Unlike the circumstances present in *Caldwell* v. *United States,* 434 F. 2d 1081 (1970), no burden whatsoever was required of the State prior to compelling the appearance and testimony of the Petitioner before these grand juries. In *Caldwell* an opportunity for a hearing with appropriate burdens and evidences was provided. Demonstration was afforded through numerous affidavits how important confidential sources are to a newsman, and through these same affidavits to show how appearing before a closed session of a grand jury often destroyed the usefulness of these sources. Petitioner's problems with his confidential informants are quite the same as those faced by Caldwell. However, due to the summary nature of the proceedings, with the burden falling entirely upon the Petitioner who only hours before was subpoenaed, opportunity was not given the Petitioner to introduce the wealth of proof presented by Caldwell. The cavalier manner in which Petitioner's constitutional rights were ignored in these cases emphasizes the need for protection of these rights.' The Petitioner's affidavit below (App. 51), forcefully establishes that the prospective evils described in this Brief are real and not fanciful.

vacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial. *Gibson, supra,* at 556-557.

Moreover, it is not just the freedom from being compelled to disclose confidential information and the names of confidential informants that a reporter must have in order to acquire the information he needs for his stories, but it is the complete trust and confidence of his informants that is bottomed upon this. In most cases these informants are persons who are in some way involved with the activities which the reporter seeks to uncover, and the informants are naturally suspicious of any dealings which the reporter may have with members of the establishment who might seek to take action against them. It is the association with these authorities which may taint the reporter's character in the eyes of his confidants. The relationship of the reporter with his informant is harmed if the reporter is called to testify before a closed governmental hearing. So long as this confidant does not know what was said by the reporter, he will be suspicious. Even a slight suspicion by a person with something to hide will destroy the channels of communication established between the suspect reporter and the informant, and the public loses an important source of news.

2. STATE ACTION WHICH RESULTS IN SELF-CENSORSHIP BY A REPORTER VIOLATES THE FIRST AMENDMENT.

A second, equally unconstitutional result may arise if the state is allowed to compel such testimony. In order to avoid such a confrontation, reporters may frequently decide not to publish concerning a matter of public concern, learned of through a confidential relationship, rather than subject themselves to legislative or grand jury investigations. Such self-censorship is as inimical to the principles of the First Amendment as direct censorship by the state. *Smith* v. *California,* 361 U. S. 147 (1959). Certainly the result is the same.

Smith, supra, involved a conviction under a Los Angeles municipal ordinance which made it unlawful for any person to have in his possession any obscene or indecent book in any place where books were sold or kept for sale. The ordinance imposed strict criminal liability for such possession. In an opinion by Justice Brennan, this Court reversed the conviction under the ordinance. The Court found that the elimination of the scienter requirement worked a substantial restriction on the freedom of speech and the freedom of the press.

> Our decisions furnished examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. *Smith, supra,* at 150-151.

The Court stressed the fact that by dispensing with the scienter requirement, the statute tended to impose a severe limitation on the public's access to constitutionally protected matter, since the seller's tendency would be to restrict the books held for sale to those he had read or inspected. "[T]he bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted." *Smith, supra,* at 153. In the same manner, the threat of being forced to testify in the future as to confidentially received information and confidential sources may well restrict the dissemination to the public in general of information known to a reporter. The self-censorship by the reporter, compelled by the state action, "would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith , supra,* at 154.

Such self-censorship amounts, in fact, to a state imposed prior restraint on the individual reporter and his ability to publish the news. The reporter, before allowing any confidentially received information to be published, has to make a decision on whether to publish such information at all and thereby subject himself to possible compelled testimony before a legislative or judicial body. If, as a result of this threat, he decides not to public these facts, than the public is the loser.

This self-censorship, due to the threat of state action, has the same effect as direct censorship imposed by fiat of the state. This Court has recently held that where such prior restraints on the publication of news

were involved, the government has, at the very least, a "very heavy burden," *New York Times Co.* v. *United States,* 39 U.S. L.W. 4879, 4885 (June 30, 1971) (White, J., concurring) to meet in order to justify such a prior restraint on publication. There has been no attempt to meet this burden here.

This Court has long recognized the need to carefully limit any type of prior restraint on the exercise of First Amendment rights. *Near* v. *Minnesota,* 283 U. S. 697 (1931). The right of the state to compel testimony by a newsgatherer in the situation we have here, and the resultant tendency of the newsgatherer to restrict the information and news that he prints, amounts to state imposed prior restraint which cannot be condoned.

> This court had occasion in *Near* v. *Minnesota* (citations omitted) to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraint on publications; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant "principally although not exclusively, immunity from previous restraints or [from] censorship." *Grosjean, supra,* at 249.

3. STATE ACTION WHICH DEPRIVES AN INDIVIDUAL OF THE RIGHT TO SPEAK ANONYMOUSLY THROUGH THE NEWS MEDIA VIOLATES THE FIRST AMENDMENT.

The freedom of speech protected by the First Amendment is also endangered by compelling newsgatherers to testify concerning their confidential sources of information. The First Amendment not only protects the right to speak, but also the right to speak anonymously. "[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Talley* v. *California,* 362 U. S. 60, 65. (1960); *see also, Bates* v. *Little Rock,* 361 U. S. 516 (1960); *National Association for the Advancement of Colored People* v. *Alabama, supra.*

This right to anonymity will be seriously infringed if the state has the right to compel such testimony. *Talley, supra,* involved a Los Angeles municipal ordinance making it a criminal offense to distribute handbills unless they carried the names and addresses of the persons who prepared, distributed or sponsored them. The Court found that such a requirement clearly restricted the "freedom to distribute information and thereby freedom of expression," *Talley, supra,* at 64, since there are people and groups who will not or cannot exercise their freedom of expression without retaining anonymity.

This is exactly the situation in which members of many dissident groups find themselves today. Important issues, such as the legalization of marijuana, the war in Vietnam, and corruption of public officials,

arouse great emotions and often lead to reprisals. Jobs are threatened, economic security may be endangered, and official state action is often a result of individual expressions of minority views. Only by maintaining their anonymity can these people speak out on issues of great public concern without fear of such reprisals, physical harm, or criminal prosecutions.[5]

It is often true that the only effective means such critics have for speaking to the public is by using the various forms of the news media. All other forms of effective communication involve expenditures far too great for the average citizen. *See,* Barron, *Access To the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967). But only by receiving assurances of confidentiality will these people speak to reporters. By compelling the testimony of these reporters concerning their informants, and thereby discouraging these informants from speaking out, the state deprives these individuals of effective freedom of expression and the right to be heard.

---

[5]In the Petitioner's article published November 15, 1969, one of the subjects is quoted as saying, "I don't know why I'm letting you do this story, to make the narcs mad, I guess. That's the main reason." (App. 3) Evidently, this subject did have a desire to speak out but remain anonymous. In the Petitioner's article published January 10, 1971, another unidentified student at Kentucky State University made this statement: "Dugee (heroin) is put in the ghetto to make people passive. I've been able to get my hands on smack ever since I was a freshman in high school. But I couldn't go buy a bottle of alcohol. It was easier to buy dope than liquor." (App. 31) Petitioner submits that it is vitally important that the general public know of such feelings. If the opinion of the Kentucky Court of Appeals is upheld such first hand statements may no longer be published.

II. THERE ARE NUMEROUS EXAMPLES IN THE LAW WHERE COMPELLED TESTIMONY IS DENIED IN ORDER TO PROTECT AND PRESERVE OTHER MORE IMPORTANT RIGHTS AND INTERESTS.

In determining whether the Petitioner's rights under the First Amendment are to be protected here the nature of the state's interest must be examined. Careful scrutiny indicates that the right of the state to compel testimony before a grand jury, in a civil or criminal trial, or before other forums having the power of subpoena, is limited by a variety of exceptions. The majority of the exceptions are based on interests which do not have the primacy of the First Amendment.

Professor Wigmore devotes nearly a full volume to discussion of instances where testimony of a witness cannot be compelled.[6] Our evidentiary rules establish that as between an immediate conviction and the long range preservation of those rights fundamental and essential to our social order, we choose preservation of fundamental rights. We would rather have a guilty man go free than punish a man who is innocent, so we require that guilt be proved beyond a reasonable doubt. In order to prevent the terrible wrongs of the Star Chamber proceedings we exclude from evidence confessions containing even the slightest taint of coercion. We refuse to allow admission of evidence if it is obtained in a search which violates the dictates of the Fourth Amendment, even though such evidence may

[6] 8 J. WIGMORE, EVIDENCE, §§2190-2396 (McNaughton rev. ed. 1961).

present conclusive proof of guilt. The right to compel testimony must similarly defer to the primacy of rights guaranteed by the Constitution. Surely the First, Fourth and Fifth Amendments speak with at least equal voices. The First Amendment was not intended to be a mere supporting player in the constitutional drama.

The problem is one of weighing the interests of society which lie on both sides of the situation.

> From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution and from law and order as an indispensable element of civilized life. *Wigmore, supra,* §2192, at 72-73

This right of a grand jury to investigate must be weighed against that right of the community as a whole to have a free and functioning press to keep it properly informed. As applied to this case, the question is whether it is more important to compel information concerning an alleged violation than to keep the channels of information concerning the widespread drug problem open to the public.

The Petitioner suggests that the answer is clear: one conviction[7] for drug violations is not nearly so important to society as having the public in general

[7]It is not at all apparent that conviction or indictment is the objective here. The subpoenaing of the Petitioner immediately following publication of his artieles, absent any showing of a pre-existing or continuing investigation, appears to be harassment.

more fully aware of the problems faced by that public due to the widespread use of drugs.

While many of the exemptions from compulsory testimony are not wholly analogous to the First Amendment privilege claimed here, the wide variety and range of these exemptions is noteworthy. Clearly, compulsory testimony is often less important than the need to protect a general public interest, granted in the Constitution or not. Thus, there are exemptions in the law for trade secrets and customers' names,[8] for official state secrets[9] and for political opinions and political votes.[10] Preservation of the secret ballot is fundamental to our society. So, for example, where vote tampering itself is the issue, we do not compel voters to disclose how they voted, even though this might be the only way to determine whether in fact there had been tampering. In this situation, the public interest which compels testimony must fall to the more important public interest involving the secrecy of the voting booth.[11]

Widely recognized is the privilege of one to refuse to disclose communications received from his spouse. Lack of an alternative source of evidence notwithstanding, public policy bars the compelled testimony of the spouse.

The privilege against self-incrimination is most fundamental. This privilege deprives the state of evidence of admission and confession, which are among

---

[8]WIGMORE, *supra*, §2212(3).
[9]WIGMORE, *supra*, §2212a(4).
[10]WIGMORE, *supra*, §2214(b).
[11]WIGMORE, *supra*, §2214(b).

the strongest forms of proof. Cf, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

The physician-patient privilege,[12] the priest-penitent privilege[13] and the attorney-client privilege[14] are privileges which, if not recognized, might assist in the identification and conviction of persons guilty of criminal acts. Obviously, the interests served the public in guaranteeing these latter exemptions stand on much less solid ground than many of these other interests herein mentioned, and particularly the interest in the preservation of the freedom of the press involved in the present case.

Perhaps most closely analogous to the reporter's privilege asserted here is the privilege protecting against compulsory disclosure of the names of police informants.[15] Although these informants may have actual knowledge of criminal acts, may in fact be guilty of criminal violations themselves, the right to protect their identity is a right zealously guarded by law enforcement agencies. The reason for this is obvious. The risk of disclosure would shrivel up the sources of information available to the law enforcement agencies through these and other potential informants. Under

[12] WIGMORE, *supra*, §§2380-2391.

[13] WIGMORE, *supra*, §§2394-2396.

[14] Under the common law of England, in the trials of the 1600's the obligations of honor among gentlemen were put forward as sufficient ground for maintaining silence. Thus, if a gentleman received a communication under a promise of secrecy, he would not be required to divulge that communication when called to testify. It was out of this exemption that the attorney-client privilege arose, resting upon the honorable obligations of the attorney not to disclose his client's secrets. WIGMORE, *supra*, §2286 at 543.

[15] *McCray* v. *Illinois*, 386 U. S. 300 (1967).

such circumstances, society through its law enforcement agencies finds it desirable to forego the prosecution of a particular crime to avoid disclosure of the identity of an informant. Balancing the public interest involved, the courts have uniformly upheld the right to protect the names of these informants.[16]

In the present case, the information received by the Petitioner was given only upon a promise of confidentiality. Under the proper circumstances, had the Petitioner been a police officer or an attorney, there is no question that the confidence could be maintained. But since the Petitioner is a member of the press, the Respondents argue that the secrecy cannot be retained. Surely, it is clear that the First Amendment guarantees protect interests as important as those which the other exemptions were created to protect.

Considering the variety and number of privileges recognized by courts in this country exempting compulsory production of certain types of evidence and witnesses, one must conclude that there is no paramount

---

[16]Various states have recognized by statute privileges to accountants, psychologists, clerks and stenographers. WIGMORE, *supra*, §2286.

Nor has the Congress of the United States been idle in providing protection to certain types of communications. There are nearly a hundred federal statutes which provide protection of this character for given disclosures. Federal agencies have also created confidences under their rule-making powers, and some agencies treat information as confidential because it is received under an informal pledge of non-disclosure. The proliferation of such non-disclosure statutes and rulings is a clear indication that society has decided that its interest in compulsory testimony is less than its interest in protecting the preservation of other interests. Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 HARV. L. REV. 400, 409, n. 46 (1968). Basic First Amendment rights, however, cannot be dependent upon this haphazard legislation or rule-making.

state right to compel the testimony of every possible witness. The demand for compulsory testimony is overridden in many situations by matters of more important public concern. The protection of First Amendment rights and privileges is clearly a matter of such overriding concern. It is only under the most compelling circumstances that the state can be allowed to intrude into this area. The interest of the state in ordinary grand jury investigations cannot override the First Amendment rights and privileges threatened by compelling a reporter to testify as to confidential information and confidential sources.

III. THIS COURT SHOULD DECLARE THAT THE FIRST AMENDMENT CONFERS UPON NEWSMEN THE PRIVILEGE NOT TO BE COMPELLED TO ENTER A CLOSED PROCEEDING AND NOT TO BE COMPELLED TO DISCLOSE CONFIDENTIAL INFORMATION ABSENT A DEMONSTRATION IN A PRIOR OPEN HEARING OF A COMPELLING AND OVERRIDING NEED FOR SUCH.

Consistent with the First Amendment rights demonstrated above, this Court should unhesitatingly declare that there exists a privilege under the First Amendment against compulsory appearances of reporters in closed proceedings and compulsory disclosure from reporters of confidential information. The privilege should state that absent a prior showing in an open hearing of a compelling and overriding need by the government for the information sought, freedom of the press under the First Amendment precludes such compulsion against the reporter.

Where First Amendment rights and privileges are threatened or restricted by state action, whether it is by means of statute, *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a legislative investigation; *Gibson* v. *Florida Legislative Investigation Committee, supra,* or some other form of state action, *see, e.g., Ashton* v. *Kentucky, supra,* it has been consistently required that the state show not only a compelling and overriding need for the action in question, but in addition that there is no less offensive means by which to accomplish an admittedly legitimate objective of the state.

The requirement for the showing by the state of a compelling need has been phrased in numerous ways. *See, e.g., Gibson* v. *Florida Legislative Investigating Committee, supra,* (an overriding and compelling state interest); *DeGregory* v. *Attorney General,* 383 U. S. 825 (1966) (a present danger of sedition); *Watkins* v. *United States, supra,* (a public need that over-balances private rights); *Sherbert, supra,* (the gravest abuses, endangering paramount interest).

It is well settled that the mere fact that the governmental purpose is legitimate and substantial, and that the state action in question is rationally related to a legitimate state purpose is not sufficient. *Shelton* v. *Tucker, supra.*

If the state can achieve its legitimate ends by other, less restrictive means, then the Constitution compels the state to do so. It is incumbent upon the state "to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner, supra,*

at 407. *Schneider* v. *State,* 308 U. S. 147 (1939), is such a case. There municipal ordinances of several cities provided that handbills were not to be distributed on the streets. The courts below had sustaining the validity of the ordinances on the ground that they were rational means with which to deal with the legitimate state problems of littering and fraud.

This Court, in an opinion by Justice Roberts, found that the ordinances were unconstitutional as an abridgment of the First Amendment. The Court stated that

> [i]n every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. *Schneider, supra,* at 161; *see also Bridges* v. *California,* 314 U. S. 252 (1941).

Directing itself to the problems of littering and fraudulent appeals, problems created by the use of such handbills which the state was trying to solve, the Court stated that there were other means, less offensive to the principles of the First Amendment, by which the state could achieve the desired purpose.

> Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police au-

> thorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press. *Schneider, supra,* at 164.
>
> Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion. *Schneider, supra,* at 160.

This consideration of alternative means for achieving legitimate state ends is not limited to cases dealing with the First Amendment. Time and again this Court has emphasized that the state is under an obligation in a criminal trial to shoulder the burden of proving its case by valid means. *See, e.g., Miranda* v. *Arizona, supra; Malloy* v. *Hogan,* 378 U. S. 1 (1964). The state interest in the instant cases presumably is an interest in investigation and prosecution of those involved in alleged criminal activity. The decisions of this Court have made it clear that the state has the burden of proving such criminal activity, and cannot rely upon private citizens to do its work.

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. *Miller* v. *United States,* 357 U. S. 301, 313 (1958); *See also, Mapp* v. *Ohio,* 367 U. S. 643 (1961).

This is emphasized again in *Escobedo* v. *Illinois,* 378 U. S. 478 (1946), where, in an opinion by Mr. Justice Goldberg, the Court stated:

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. *Escobedo, supra,* at 490.

Such a "short-cut method" of law enforcement, resulting in a denial of First Amendment rights to individuals and the public in general, is being used here. The state, rather than using its own vast resources to investigate alleged criminal activity, is trying to use news reporting bodies as its investigative arms. This can only result in a restriction on the freedom of the press and a loss of individual rights of free speech. The state must be made "to shoulder the entire load," *Miranda, supra,* at 460, in its efforts to investigate and prosecute alleged criminal activities.

In addition, it is important to note that the grand jury investigations we are dealing with here were started only in response to the new stories written by the Petitioner. This standing alone is a strong indication of the vital service provided a community by a free and unhampered press. A news reporter, aided by the fact that he insured his "informants" that he would not reveal their names or any confidentially communi-

cated information, was able to report to the community as a whole a situation involving the use of drugs which was known only to a certain segment of that community. In so doing, the Petitioner was performing a vital function of the free press, a function which the First Amendment was created to protect.

Yet, by requiring the Petitioner to appear and to testify before a grand jury regarding his confidential information and sources of such information, gathered in his capacity as a reporter, the state is performing a severe disservice to the community as a whole, and to the policies served by freedom of press specifically.

As in any other case involving an abridgment of constitutional freedoms by governmental action, the government here bears the burden of demonstrating that the inroads it seeks to make into constitutionally protected rights are necessary under the circumstances involved. Before the government can make inroads upon freedom of the press or the freedom of speech, the reasons must be "extremely serious" and the degree of imminent danger "extremely high." *Bridges* v. *California*, 314 U. S. 252, 263 (1941).

Before a newsman may be required to appear before a closed session of a body having subpoena powers, an inquiry must be made in an open hearing to determine whether the necessary compelling need has been shown to justify infringement of the constitutional rights involved. An open forum must be provided to escape the indelible stigma of an appearance before a closed hearing, which is so destructive of patiently cultivated

confidences necessary to efficient newsgathering. The same type of hearing must be held if a newsman relies on his right to refuse to disclose confidential information or identify informants when subpoenaed to testify in a trial or upon deposition.

The requirement of an open hearing to determine the need for the appearance and testimony of a newsgatherer in such situations is of the utmost importance. Whether a reporter answers questions in a closed hearing regarding confidential information or the identity of his informants is unimportant if these informants suspect that he has given this testimony. The flow of information will cease. It is only by means of such an open hearing that the consequences of an appearance behind closed doors, and the suspicion that such an appearance breeds, can be avoided.

While each case must be judged on its own facts regarding the existence of a substantial state interest compelling the need for the testimony in question, and while there are no such facts presented in the instant cases, there are certain factors which the Petitioner would suggest as essential to a finding of compelling need. There well may be other relevant facts and circumstances for a court to consider, but Petitioner suggests that the three factors discussed below are absolutely essential to a constitutional ruling that a compelling need exists for the testimony in question.

The fact that a crime may have been committed is not enough to overcome the burden of showing compelling need. This Court has recognized that the fact that a substantive wrong has occurred does not neces-

sarily mean that a wrong is substantial, or that the danger to the state is imminent. *Bridges* v. *California, supra.* All substantive evils are not substantial evils, and *it is incumbent upon the state to demonstrate that the newsman's appearance and testimony is necessary to prevent direct, immediate and irreparable prospective damages to national security, human life or liberty.*

In order to demonstrate the requisite "compelling need," *DeGregory* v. *Attorney General, supra,* for the testimony of a newsgatherer, the state must show not only that the alleged criminal activity presents a direct, immediate and irreparable prospective threat of damage to national security, human life, or liberty, but it must also prove that the reporter has the information directly related to the alleged criminal activity, and that the state has no other means, less destructive of constitutional rights by which to obtain such information. *Sherbert* v. *Verner, supra.*

These factors are basic to a determination that the rights of a free press must be subordinated for the protection of the public welfare. Only where there is a direct, immediate and irreparable prospective threat to one right can another right be subverted. Where there is a threat to human life or national security there may be reason to infringe upon the rights protected by the First Amendment, if there is certainty that the abridgment will prevent the anticipated harm.

The nature of the state's interest in various criminal activities varies according to the nature of the crime involved. Society's need to protect itself is not present in the criminal activity alleged in the instant

cases. There is no threat of violence in the immediate future which justifies this state intrusion into the constitutionally protected areas of freedom of the press and freedom of speech. No life is being threatened. No overthrow of government is imminent. Without these elements, the state's interest in the testimony cannot justify the deprivation of constitutional rights which would result.

The requirement that the state prove that the reporter in question has the information related directly to the alleged criminal activity is clear. Without such a showing, state officials are in a position to constantly harass reporters who are responsible for "unpleasant news reports" and there is the temptation to use reporters as an arm of state law enforcement and in the process, destroy the functions the First Amendment was created to protect.

Despite the requisite proof, compelled testimony of this nature would still involve restrictions on the exercise of First Amendment rights. To prevent any unnecessary intrusions into this area by the state, the Petitioner suggests that the state should be required to show that it has no other means to obtain the information sought from the reporter. "[I]t would plainly be incumbent upon the (state) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner, supra,* at 407.[17]

[17]It should be emphasized that any such showing is in addition to and not in lieu of the other conditions set forth. The absence of alternative sources is not itself a sufficient basis for infringement of First Amendment rights.

Requiring that compelling need be shown is not such a complex problem as will constitute a unreasonable burden upon the courts. Knowledge that the availability of a reporter's information is so limited will discourage many attempts to gain such information.

IV. THE STATE HAS MADE NO DEMONSTRATION OF ANY NEED FOR THE INFORMATION ALLEGEDLY POSSESSED BY THE PETITIONER.

Attention must now be turned to the facts of the particular cases here involved to determine whether the State has met any burden in demonstrating that conditions existed under which the First Amendment rights involved should be subordinated to a higher interest of the State. The record shows that in neither of these two cases was any attempt made by the State to prove the presence of any compelling and overriding need for the Petitioner's testimony or appearance. As indicated by the Kentucky Court of Appeals, Petitioner was found to be in a position no different from that of any other grand jury witness.

In the *Hayes* case the Petitioner was brought before the court after refusing to disclose to the grand jury confidentially received information. After hearing arguments concerning the applicable law, the court directed the Petitioner to answer the questions posed by the grand jury. No evidence whatsoever was presented to show any extraordinary need or interest in obtaining the testimony of the Petitioner; in fact, no such effort was made. Apparently, the sole basis for believing the Petitioner was possessed of any informa-

tion concerning the illegal use and possession of marijuana or hashish was the newspaper article itself. There was no indication that the grand jury was possessed of any other information which might lead it to subpoena the Petitioner. Not only was there no burden on the state to show some need for Petitioner's testimony, there was no recognition of any First Amendment protections whatsoever.

In the *Meigs* case, no evidence was required or produced to show any unusual, extraordinary or compelling need for the Petitioner's attendance at the secret grand jury session. Judge Meigs saw nothing in the First Amendment which would afford a reporter any protection from appearing and testifying before the grand jury. After a very brief hearing on the Petitioner's motion to quash the subpoena, the Petitioner was ordered to appear before the secret session of the grand jury. Once again, the only apparent reason the grand jury had to believe the Petitioner possessed information of interest was the news stories themselves. No effort was made by the State, or required of it, to show any compelling or other need for the Petitioner's appearance before the grand jury.

The Kentucky Court of Appeals refused to grant Petitioner the relief he requested in either of the two cases, and specifically refused to recognize that any First Amendment protections extended to Petitioner in the situations here involved. The Kentucky Court of Appeals further held that even if there were First Amendment rights involved, the Petitioner failed to show that he would be harmed by appearance before

the grand jury. Thus, the Kentucky Court of Appeals has taken the unique position of requiring an individual to prove that he will be damaged when constitutional protections extending to him are abridged, rather than requiring the state to overwhelmingly justify disregarding the First Amendment's protective shield.

Recognizing that the rights guaranteed to the press are no less important than the rights guaranteed by other sections of the Constitution, the same protection must be afforded when an attempt is made to set these rights aside in the name of the state. As in any other case, the state bears a heavy burden of proof before the free function of the press may be compromised. In these cases the State has made no attempt to meet its burden of proof. Astonishingly, the Kentucky Court of Appeals has decreed that the burden is on the Petitioner to prove that he will be damaged by the abridgment of his constitutional rights.

Where the state has failed to sustain its burden of proving a direct, immediate prospective threat of irreparable damage to life, liberty or the national security, neither the Petitioner nor any other news reporter can be required to appear before a grand jury or to disclose his confidential information. These particular cases are not ones where society has an overriding need to protect itself. There was no threat of violence in the immediate future in either of these cases which justified the State's intrusion into constitutionally protected areas. Neither life nor liberty was threatened. Certainly the national security was not at stake. Without these elements, the State's interest

cannot justify the deprivation of the constitutional rights posed.

In each of these two cases the State seeks to capitalize on information gained by the Petitioner only because the Petitioner was able to promise that the names of certain persons supplying that information would not be disclosed. Thus, the State has engaged in a futile, self-defeating exercise which can only result in the loss of many valuable sources of news which are vital necessities in the effort to fully inform the public. These cases present no difficult problems in determining whether or not the State has met its burden of proving its compelling need. No proof whatsoever was offered. Whether the test to be applied is that suggested by the Petitioner, or some other, the decisions of the Kentucky Court of Appeals cannot stand because they have required no burden at all. Only if the Petitioner, as a newsman, had no protection whatsoever under the First Amendment when he was subpoenaed by a grand jury can the decisions here in question be upheld.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments of the court below should be reversed.

Respectfully submitted,

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202

Counsel for Petitioner